No. 08-1438

In The

Supreme Court of the United States

HARVEY LEROY SOSSAMON, III,

Petitioner,

v.

TEXAS, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to 2000cc-5, Congress invoked its spending power to authorize suits for "appropriate relief" against a "government" violating RLUIPA's substantive conditions after receiving "Federal financial assistance" of any kind, *see id.* §§ 2000cc-1(b)(1), 2000cc-2(a).

The questions presented are:

1. Whether RLUIPA's reference to "appropriate relief"—without any textual hint of what relief is indeed "appropriate"—is sufficient to unmistakably show that Congress conditioned the disbursement of federal funds on States waiving their sovereign immunity not only for equitable relief but also for money damages.

2. Whether RLUIPA's definition of "government" should be construed to authorize personal-capacity suits seeking damages from individuals who did not receive any federal funds and whose actions otherwise fall entirely beyond the reach of Congress's enumerated regulatory powers.

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REASONS FOR DENYING THE PETITION

Petitioner frames his petition as presenting a single question, but that is wrong. The petition presents two questions, not one. The first—asking whether States waived their immunity from damages actions—implicates only an exceedingly narrow circuit conflict. Indeed, five courts of appeals—four in the RLUIPA context and one addressing the same "appropriate relief" phrase in the Religious Freedom Restoration Act—have found this language insufficient to waive an entity's sovereign immunity for money damages. Only the Eleventh Circuit has held otherwise, and it did so before the Fifth, Sixth, and Seventh Circuits confronted the question. Given that these courts each explicitly rejected the Eleventh Circuit's approach, there is good reason to believe, once the Eleventh Circuit has an opportunity to revisit the question, that this shallow conflict will resolve itself.

In any event, this narrow conflict is particularly meaningless in this case: petitioner would not even prevail under the standard the Eleventh Circuit has adopted. Because that court found, in this factual context, that the Prison Litigation Reform Act barred any damages RLUIPA otherwise allowed, petitioner would face the same outcome even had his lawsuit arisen in the Eleventh Circuit.

The second question presented—asking if Congress intended the statutory term "government" to include individual employees—does not implicate any genuine split at all. That alone is sufficient to disqualify this

important statutory question from review at this time. In any event, petitioner's reading of RLUIPA would create a "novel" and "unprecedented" act of federal regulatory power. Under the theory that petitioner advances, Congress can expand its regulatory power under Article I (and undercut the federalism limits on our dual system of government) by imposing its own regulations in areas otherwise beyond its reach—so long as Congress can find any person, public or private, willing to accept federal funds *and bind a third party* to the corresponding conditions. The Spending Clause, to be sure, is not restricted to its bare terms; Congress is free to attach conditions that are necessary and proper—but they must be *proper*, and a condition that expands federal power beyond the structural checks in the Constitution is demonstrably not that.

Given that this petition arises in an interlocutory posture, that petitioner's request for relief would fail on other grounds even were he to prevail here, and that the Fifth Circuit correctly resolved this matter on the merits, further review is not warranted. The petition should be denied.

I. FOR A VARIETY OF REASONS—INCLUDING ITS INTERLOCUTORY POSTURE—THIS CASE IS A POOR VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED.

This case suffers from at least four substantial vehicle problems. Each casts real doubt on the likelihood that the Court's resolution of these serious constitutional and statutory issues will have any effect on the ultimate outcome of this proceeding. Because issues of this magnitude should be resolved in a

concrete dispute where the answer will not prove almost certainly academic, the petition should be denied.

A. The case arises in an interlocutory posture, a sufficient reason alone for denying the petition. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (the lack of final judgment "alone furnishe[s] sufficient ground" for denying certiorari); *see also VMI v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari) (explaining that the Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction").

There is no compelling basis for departing from this Court's traditional practice of reviewing cases after final judgment, not before. Petitioner has not yet proven that he has a viable claim, much less one entitling him to damages. Indeed, the district court *rejected* his RLUIPA claims on the merits, *see* Pet. App. 53a-56a; the Fifth Circuit, in turn, declared one moot while acknowledging it might not have succeeded anyway, *id.* at 12a, and remanded the second in light of a material factual dispute, *id.* at 31a-32a. Because petitioner might still lose even if he prevails on the points raised in this petition, the Court's resolution of these questions at this juncture might prove wholly academic in the context of this case. The Court should await a vehicle presenting *proven* (not hypothetical) claims in a *final* (not interlocutory) posture so that the Court's decision will be outcome-determinative—and not simply contingent on the result of further proceedings on remand. *See Brotherhood of Locomotive*

Firemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "because the Court of Appeals remanded the case," rendering it "not yet ripe for review by this Court").

To be sure, because the Fifth Circuit did dismiss one of petitioner's claims as moot (Pet. App. 12a), petitioner will have to raise the damages issue again after final judgment in order to proceed any further on that claim. But the slight inconvenience for this single petitioner on that single claim does not warrant abandoning this Court's traditional and sound practice of refusing to hear interlocutory appeals in all but the most unusual and compelling circumstances. *See, e.g.*, Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 281 (9th ed. 2007). Petitioner can raise the same questions afresh after final judgment in a new petition, thereby presenting a fully developed factual record and allowing additional time for the issues to percolate among the lower courts. If he in fact prevails on the merits, and if at that point other courts have reached opposite conclusions after squarely addressing the questions presented in a meaningful way, review in this Court might indeed be appropriate. It is not, however, appropriate for this case at this time.

B. The Court's review would prove academic in this case for another reason: the Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e(e), stands as an independent bar to any damages award.

Under the PLRA, Congress categorically foreclosed prisoner suits seeking damages for non-physical injuries: "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional

facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.'" 42 U.S.C. § 1997e(e); *see also, e.g.*, *Geiger v. Jowers*, 404 F.3d 371, 374 (5th Cir. 2005) (per curiam) (finding even *constitutional* claims under the First Amendment barred by the PLRA's "physical injury requirement"). Because Congress explicitly incorporated the PLRA into RLUIPA's provision for judicial relief, *see* 42 U.S.C. § 2000cc-2(e), there is no doubt that this bar applies to these statutory proceedings. *E.g.*, *Koger v. Bryan*, 523 F.3d 789, 804 (7th Cir. 2008) (instructing the district court on remand that the PLRA applies in a RLUIPA suit); *see also Geiger*, 404 F.3d at 375 ("[w]e agree with the majority of the other federal circuits that have addressed this issue in holding that it is the nature of the relief sought, and not the underlying substantive violation, making compensatory damages for mental or emotional injuries non-recoverable, absent physical injury"); *Allah v. Al-Hafeez*, 226 F.3d 247, 250 (3d Cir. 2000) (finding First Amendment claim asserting non-physical injury foreclosed because "[t]he plain language of § 1997e(e) makes no distinction between the various claims encompassed within the phrase 'federal civil action' to which the section applies").

Under this controlling rule, RLUIPA cases asserting non-physical injuries—which describes the injury petitioner claims in this case, *see* Pet. App. 2a-3a—are categorically ineligible for monetary damages. Because any damages authorized under RLUIPA will be immediately forbidden under the PLRA, the issues raised in this petition cannot possibly prove relevant to the ultimate disposition of this case.

See, e.g., Mayfield v. Tex. Dep't of Criminal Justice, 529 F.3d 599, 605-06 & n.8 (5th Cir. 2008) (finding it unnecessary to decide whether RLUIPA authorizes compensatory damages because the PLRA barred the plaintiff's "claims for damages"). Indeed, the Eleventh Circuit itself—the only circuit to have suggested damages are available under RLUIPA in suits against sovereign entities—held that the very compensatory damages it found authorized under RLUIPA were immediately "precluded under the PLRA." *Smith v. Allen*, 502 F.3d 1255, 1271 (11th Cir. 2007).

If the Court wishes to decide whether RLUIPA authorizes monetary relief against sovereign entities or individual defendants, it should do so with a vehicle arising in a different context—either a prisoner claiming physical injury or a non-prisoner alleging violations of RLUIPA's land-use provisions, 42 U.S.C. § 2000cc—to determine the important RLUIPA questions in a case where it actually matters.[1]

C. There is an additional reason why this petition is a particularly poor vehicle for resolving the

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1. Nor is this an appropriate vehicle for resolving any issue over the proper scope of the PLRA. *See, e.g., Royal v. Kautzky*, 375 F.3d 720, 728 (8th Cir. 2004) (Heaney, J., dissenting) (noting limited confusion over whether "the PLRA's physical injury requirement applies to all constitutional claims"). The fact that petitioner did not even acknowledge the issue in his petition is immediately disqualifying—as is the fact that the court of appeals did not pass on the question below, *see, e.g.*, Pet. App. 24a. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001); *NCAA v. Smith*, 525 U.S. 459, 470 (1999).

questions presented. Petitioner now claims, for the first time, that the Civil Rights Remedies Equalization Act of 1986, 42 U.S.C. § 2000d-7, authorizes money damages even if RLUIPA does not. *See* Pet. 32 n.10. That Act explicitly waives sovereign immunity for suits, including damages suits, alleging violations of "section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or *the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.*" 42 U.S.C. § 2000d-7(a)(1), (2) (emphasis added). Petitioner contends that this last clause—a catch-all sweeping in a specified class of statutes—includes RLUIPA as "a statute forbidding religious discrimination by recipients of federal funds." Pet. 32 n.10. Because petitioner did not press this point below, however, he cannot properly raise it now. *See, e.g., United Foods, Inc.*, 533 U.S. at 417. He has therefore failed to preserve the full range of issues necessary for properly considering the questions presented in the petition.

To be sure, petitioner is wrong that § 2000d-7 is applicable in the RLUIPA context. This is why the Fourth Circuit (as petitioner apparently concedes, *see* Pet. 32 n.10) has already rejected his argument. *See Madison v. Virginia*, 474 F.3d 118, 132-33 (4th Cir. 2006) (explaining that all the enumerated statutes, unlike RLUIPA, textually prohibit "discrimination" and mandate equal treatment, not RLUIPA's "religious accommodation"; because the catch-all provision, under established canons of construction, is defined by the company it keeps, it presumably does not embrace

RLUIPA). But the very fact that § 2000d-7 does have a possible role in the analysis suggests a better vehicle would be one where the petitioner raised, and the court of appeals addressed, all the issues potentially bearing on these questions. Because this is not such a vehicle, the petition should be denied.

D. The petition also suffers from a final potential vehicle problem: because qualified immunity would almost certainly bar any damages RLUIPA would otherwise allow, this is not a suitable vehicle for resolving the individual-capacity damages question. *See* Pet. 17-18 (recognizing cases applying a qualified-immunity analysis).

Indeed, petitioner simply ignores that the Fifth Circuit rejected his First Amendment claims—based on the identical constellation of facts—on the ground that he identified "no cases" proving any defendants' actions "unreasonable in light of clearly established federal law." Pet. App. 33a. Although there is some daylight between the substantive standards of RLUIPA and the core protections of the First Amendment, there is no obvious or apparent daylight on the single point the court of appeals identified in upholding immunity: the lack of *any* relevant precedent would surely suggest a strong basis for qualified immunity even under RLUIPA's more demanding standard. Because the ultimate disposition of this question will likely turn on qualified immunity—and not the Court's resolution of the question presented—this is not the right vehicle for resolving this important issue.

II. THE FIRST QUESTION PRESENTED—ASKING WHETHER "APPROPRIATE RELIEF" INCLUDES MONETARY DAMAGES IN SUITS AGAINST THE STATE—DOES NOT IMPLICATE ANY CIRCUIT SPLIT ON THESE FACTS OR OTHERWISE WARRANT REVIEW.

Petitioner has identified a weak and shallow conflict over whether RLUIPA authorizes damages actions against sovereign entities. But petitioner is incorrect that the conflict warrants this Court's review: the four-to-one split is hardly "widespread," and given that three of the five circuits confronted the issue for the first time in 2009, it is not at all "mature." *Compare* Pet. 23. And the conflict is certainly not entrenched: the Eleventh Circuit, as the single outlier, has not yet had the opportunity to revisit the question in light of the intervening decisions from other circuits. In any event, the split is not even material to the disposition of this case: because the Eleventh Circuit would find petitioner's claim barred under the PLRA (whereas every other circuit would find it barred under RLUIPA), petitioner cannot prevail under the standard currently applied in *any* circuit. Further review is therefore not warranted.

A. Four circuits have now squarely held that the phrase "appropriate relief" does not "provide the 'unequivocal textual expression' necessary to effect a sovereign's waiver to suits for damages." *Nelson v. Miller*, No. 08-2044, __ F.3d __, 2009 WL 1873500, at *14 (7th Cir. July 1, 2009); *see also Cardinal v. Metrish*, 564 F.3d 794, 801 (6th Cir. 2009) ("RLUIPA does not contain a clear indication that Congress

unambiguously conditioned receipt of federal prison funds on a State's consent to suit for monetary damages"); Pet. App. 23a ("RLUIPA is clear enough to create a right for damages on the cause-of-action analysis, but not clear enough to do so in a manner that abrogates state sovereign immunity from suits for monetary relief."); *Madison*, 474 F.3d at 131 ("We conclude that RLUIPA's 'appropriate relief against a government' language falls short of the unequivocal textual expression necessary to waive State immunity from suits for damages."). The D.C. Circuit has also reached the same conclusion in the context of the Religious Freedom Restoration Act and the federal government's sovereign immunity. See *Webman v. Federal Bureau of Prisons*, 441 F.3d 1022, 1023 (D.C. Cir. 2006) (RFRA's provision for "appropriate relief" does "not provide the kind of clear and unequivocal waiver of sovereign immunity governing precedent requires"); *see also id.* at 1026 (Tatel, J., concurring) ("although appellants rightly point out that the term 'appropriate relief' ordinarily 'confers broad discretion on the Court' to fashion a remedy, such sweeping statements have no applicability in the sovereign immunity context") (citation omitted).

The Eleventh Circuit, however, has alone reached the opposite conclusion. In *Smith v. Allen*, 502 F.3d 1255 (11th Cir. 2007), the court concluded that "the phrase 'appropriate relief' in RLUIPA encompasses monetary as well as injunctive relief." 502 F.3d at 1271. Rather than asking whether RLUIPA's text expressly and unequivocally authorized damages, the Eleventh Circuit asked whether the text "explicitly *limited*" damages as a remedy. *Id.* at 1270 (emphasis

added). According to the Eleventh Circuit, any kind of relief not expressly excluded was presumptively available: "where Congress ha[s] not given any guidance or clear indication of its purpose with respect to remedies, federal courts should presume the availability of all appropriate remedies." *Ibid.* (citing *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 68-69 (1992)).

Other circuits have since responded by expressly rejected the Eleventh Circuit's approach. *See, e.g.*, *Nelson*, 2009 WL 1873500, at *14 (favoring "the Fourth and Fifth Circuits' analysis" over the analysis in *Smith*); *Cardinal*, 564 F.3d at 800 ("We disagree with the Eleventh Circuit's holding that *Franklin* is applicable to a claim against a State for money damages under RLUIPA."); Pet. App. 22a ("[t]he Fourth Circuit, we believe properly, continued the analysis where the Eleventh left off"). These circuits have criticized the Eleventh Circuit's failure to recognize the clear-statement rules that apply where the defendant is a sovereign entity. As the Fifth Circuit explained, "[t]he rules of construction that the Eleventh Circuit applied * * * disappear when we must interpret an ambiguous provision against the backdrop of a state's sovereign immunity." Pet. App. 23a. Because the Eleventh Circuit did not apply "the current Supreme Court case law requiring waivers of sovereign immunity to be 'unequivocally expressed,'" *Cardinal*, 564 F.3d at 801, its decision adopted a standard that is exactly backwards: damages are *excluded* unless the text unambiguously says otherwise, not the other way around. *E.g.*, *Nelson*, 2009 WL 1873500, at *14.

In light of this direct repudiation, and contrary to petitioner's contention, there is no reason to believe that the Eleventh Circuit's position is necessarily "entrenched." Pet. 22. Petitioner's only evidence of this point is two Eleventh Circuit orders denying rehearing en banc on this issue and an unpublished decision applying circuit precedent—but all were filed *before* these three additional circuits issued new decisions rejecting *Smith*'s approach. The Eleventh Circuit has not addressed the logic underlying the uniform decisions from other circuits, and it has not explained how its own decisions can be squared with settled precedent requiring an "unequivocal textual expression" in order to waive sovereign immunity. *Madison*, 474 F.3d at 132. There is no reason for this Court to take up the issue before it has had more time to percolate, and particularly before the Eleventh Circuit has had a meaningful opportunity to revisit the question or at least confront the flaws the other circuits have identified in its decision.

B. In any event, there is an additional reason to believe the Eleventh Circuit will revisit circuit precedent: its theory, much like petitioner's, is plainly incorrect and cannot be squared with settled law.

1. Under controlling precedent, statutory language must be unmistakably clear before a court will presume Congress intended to condition the receipt of federal funds on a waiver of immunity. *Arlington Cent. Sch. Dist. Bd. of Edu. v. Murphy*, 548 U.S. 291, 296 (2006); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Since that presumption extends not only to immunity from suit, but also to immunity

from damages, petitioner's theory necessarily fails unless RLUIPA's statutory language unambiguously authorized monetary relief. *E.g.*, *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33-34 (1992); *see also California v. Deep Sea Research, Inc.*, 523 U.S. 491, 506-07 (1998) (recognizing "a correlation between sovereign immunity principles applicable to States and the Federal Government"). The statutory language here clearly did not.

Indeed, the phrase "appropriate relief" is entirely question-begging: it simply asks whether damages relief would be *appropriate* in this context. In light of the presumption in favor of *retaining* immunity, such relief plainly is not authorized under the act. Petitioner's contrary contention—that all relief is authorized unless expressly forbidden (Pet. 29)—would stand this settled law on its head. Words like "implied" and "presumed" simply have no role under a clear-statement standard. *See, e.g.*, *Arlington Cent. Sch. Dist.*, 548 U.S. at 300-01.

2. Contrary to petitioner's contention, *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), and *Barnes v. Gorman*, 536 U.S. 181 (2002), do not hold otherwise. Pet. 27-29. Both cases involved *non-sovereign* defendants, and so the limits on relief from *sovereign* entities were simply not present. *See, e.g.*, *Lane v. Pena*, 518 U.S. 187, 196-97 (1996). Where a defendant is a county or municipality—and is not protected from immunity—monetary relief may very well be "appropriate." *E.g.*, *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 369 (2001); *N. Ins. Co. of N.Y. v. Chatham County*, 547 U.S. 189, 193-94

(2006). But as the Court held in *Lane*, the opposite rule applies in suits, such as the one here, against a sovereign entity. 518 U.S. at 196-87.

Nor is petitioner correct that other provisions of RLUIPA supply the clarity missing from the operative "appropriate relief" clause. The fact that the United States is restricted to seeking declaratory and injunctive relief (42 U.S.C. § 2000cc-2(f))—a limitation not expressly included in the provision authorizing private-party suits—is wholly beside the point. *Contra* Pet. 31. When the United States sues a State, *there is no immunity defense. See, e.g., Employees of the Dep't of Public Health & Welfare v. Dep't of Public Health & Welfare*, 411 U.S. 279, 286 (1973). Because the default in such suits is the same as the default in suits against non-sovereign defendants, it is entirely sensible that Congress would be forced to affirmatively exclude relief it had implicitly excluded under the private-party provision.

And, finally, petitioner is wrong that damages are essential, as a policy matter, for enforcing RLUIPA's conditions and ensuring adequate deterrence. Pet. 23-24. This is a policy judgment best left to the political branches. In any event, petitioner's policy judgment is not obviously correct: the very fact that prisons are adjusting their practices in response to RLUIPA suits is a positive, not negative, development. A prisoner might not receive compensation, but he does achieve the substantive change in the prison policy that he sought.

In any event, should Congress condition federal funds on a waiver of immunity from money damages,

it is entirely possible that States may choose to opt out of the statute entirely. In that event, there would be no enforcement or deterrent effect at all for prison policies that are constitutionally adequate but fall short of providing the kind of affirmative accommodations that RLUIPA requires.

C. In any event, petitioner is wrong that the shallow split on this question is even implicated by the facts of this case: because the Eleventh Circuit held, in the context of non-physical injuries, that the PLRA forbids any damages that RLUIPA otherwise allows, the outcome here would have been exactly the same even in the Eleventh Circuit. *See Smith*, 502 F.3d at 1271. Because the same claim would have the same fate in the only circuit adopting petitioner's standard, there is no meaningful split warranting further review.

III. THE SECOND QUESTION PRESENTED FAILS TO IMPLICATE ANY GENUINE CIRCUIT SPLIT AND DOES NOT OTHERWISE WARRANT REVIEW.

There is no genuine circuit conflict on the second question and review is otherwise unwarranted.

A. Petitioner contends that the circuits are divided on the second question (Pet. 16-21), but he is wrong. Every circuit to have addressed the question has uniformly held that Congress did not intend to authorize damages actions against individuals in their personal capacity. *See Nelson*, 2009 WL 1873500, at *15-*18; *Rendelman v. Rouse*, No. 08-6150, __ F.3d __, 2009 WL 1801530, at *5-*6 (4th Cir. June 25, 2009); Pet. App. 16a-20a; *Smith*, 502 F.3d at 1272-75. These circuits have confronted the statutory text in light of

the serious constitutional undertones, and held that Congress should not be presumed to have authorized suits against third parties who the federal government could not regulate directly and who themselves received no federal money (and hence did not enter into a Spending Clause "contract," *see Pennhurst*, 451 U.S. at 17). *See, e.g.*, *Rendelman*, 2009 WL 1801530, at *5 ("Our research suggests * * * that it would be a novel use of the spending clause to condition the receipt of federal funds on the creation of an *individual capacity* damages action; we can find no instance in which the spending clause has been used in this manner."); Pet. App. 19a (describing the would-be "end-run around the limited powers of Congress to directly affect individual rights").

Contrary to petitioner's contention (Pet. 17-18 & n.6), no other circuit has confronted the question and reached the opposite conclusion. Petitioner cites a series of cases in which a circuit did not squarely address the question—or even acknowledge its existence. *See, e.g.*, Pet. App. 15a (describing one circuit's decisions as having "assumed" a personal-capacity action exists, but also noting that "its cases contain no analysis and are unpublished"). Because questions lurking in the background are not deemed properly addressed or decided, those cases *held* nothing. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) ("'Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.'"). Indeed, there was no meaningful discussion—or any discussion—in these cases of *Pennhurst*, the limits of Congress's

spending power, or the serious consequences for our system of few and enumerated powers should Congress have the authority to regulate parties, under its spending power, who do not receive any federal funds.

The best evidence undercutting petitioner's argument is petitioner's lead case from the Seventh Circuit. *See* Pet. 17 (citing *Koger v. Bryan*, 523 F.3d 789 (7th Cir. 2008)). Petitioner contends that case implicitly authorized a personal-capacity action. But the Seventh Circuit has since confronted the issue directly, and held that such suits are *not* authorized under RLUIPA. *See Nelson*, 2009 WL 1873500, at *15-*18. The circuit did not have to take the matter en banc in order to accomplish that result. Because a case does not stand for a proposition that it neither discussed nor decided, petitioner is plainly wrong that there is any current circuit split on this issue. *See, e.g.*, *Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality op.) ("cases cannot be read as foreclosing an argument that they never dealt with") (citing *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952)).[2]

B. In any event, the Fifth Circuit's statutory interpretation of RLUIPA was correct.

There are three canons of construction that required the court to construe RLUIPA, if possible, not to authorize suits against individuals whose conduct is beyond Congress's regulatory control and who do not

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2. Petitioner also cites as support a purported conflict on the issue among various district courts. These conflicts, of course, do not warrant review, *see* Sup. Ct. R. 10, as the supervising circuits are capable of resolving any uncertainty at the trial level.

directly receive federal funds. The first is the canon of constitutional avoidance: since "[t]he legitimacy of Congress' power to legislate under the spending power" rests on a recipient "voluntarily and knowingly accept[ing] the terms of the 'contract,'" *Pennhurst*, 451 U.S. at 17, it would be at least "'an unprecedented and untested exercise of Congress' spending power'" to bind third parties who did not agree to be bound by the "contract," *Nelson*, 2009 WL 1873500, at *17 (citation omitted).

The second is a presumption against "alter[ing] the balance of federal and state powers." *Salinas v. United States*, 522 U.S. 52 (1997). Whether or not Congress has the power to regulate individuals in a way not authorized directly by the "few and defined" powers in Article I, its use of such power would undeniably alter the federal-state balance. Under petitioner's theory, RLUIPA would stand as a "novel" and "unprecedented" attempt to reach private conduct that is traditionally controlled only by the States. And because spending legislation has the power to preempt conflicting state law, this federal legislation not only expands the enumerated limits of the federal government, but also correspondingly detracts from the powers reserved to the States. "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (internal quotation marks omitted).

And the third canon is the requirement that Congress speak clearly when attaching conditions to the receipt of federal funds: "In interpreting language in spending legislation, we thus 'insis[t] that Congress speak with a clear voice,' recognizing that '[t]here can, of course, be no knowing acceptance [of the terms of the putative contract] if a State is unaware of the conditions [imposed by the legislation] or is unable to ascertain what is expected of it.'" *Davis v. Monroe County Bd. of Edu.*, 526 U.S. 629, 640 (1999); *see also id.* at 654-55 (Kennedy, J., dissenting) ("the Spending Clause power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach"). The authorization of personal-capacity suits would directly affect recipients in two ways. The first is that it is well recognized that government entities often indemnify their employees; so petitioner's reading would subject States to the same damages awards that they avoided under the "appropriate relief" clause. The second is that it would make state employment less attractive—and presumably require an offsetting benefit. If Congress wishes to impose this condition, it must speak clearly.

In addition, contrary to petitioner's contention, the court's interpretation of the statutory term "government" was wholly reasonable. As an initial matter, in common parlance, "government" is most naturally read to target an entity exercising state power—not to target an individual in a personal

capacity. Second, Congress did not simply say "person acting under color of State law"—it said "*other* person." Given that statutory terms are known by the company they keep, *see, e.g.*, *Madison*, 474 F.3d at 133, and considering that the preceding clauses undeniably are focused on entities exercising government power, not individuals acting for themselves, it stands to reason that Congress was limiting the third clause in 42 U.S.C. § 2000cc-5(4)(A) to the same kind and category of entities referred to in the preceding two clauses—all of which are most sensibly read as regulatory bodies. Finally, "other person" is readily construed as a catch-all provision: it covers any other branch of local government not listed by its technical name in the first two clauses, and it also catches entities such as private prison corporations—which are both "persons" and exercise state power as entities, not individuals. And, of course, all of these constructions avoid the scenario in which a third party is bound by the conditions of a spending "contract" to which he or she did not consent.

Finally, Petitioner contends (Pet. 34-36) that this issue is controlled by *Sabri v. United States*, 541 U.S. 600 (2004), but that is incorrect. *Sabri* rejected the contention that there was an insufficient *nexus* between the federal funds an entity received and a subsequent bribery prosecution. *See, e.g.*, 541 U.S. at 608. It neither squarely addressed nor resolved whether Congress could target third parties as a constitutional *means* of achieving its (otherwise permissible) objective. This, perhaps, is why the opinion never once mentions *Pennhurst* or raises any of the related concerns voiced by the four circuits to have resolved the question presented here.

In any event, petitioner does not contend—because he cannot contend—that any appellate court has addressed the theory he advances (much less resolved it in his favor). This suggests that he in fact is overreading *Sabri*. But, at a minimum, it proves that additional percolation is warranted before this Court reviews this claim.

IV. THE FIFTH CIRCUIT DID NOT INVALIDATE (PARTIALLY OR OTHERWISE) AN ACT OF CONGRESS.

Petitioner is plainly incorrect that review is warranted because, according to petitioner, the Fifth Circuit effectively invalidated an Act of Congress. Pet. 25-26. The court of appeals did no such thing. As to the first question—whether "appropriate relief" authorizes damages—the court never once said that Congress lacked the power to condition the disbursement of federal funds on a waiver of immunity; it simply found that Congress had not exercised that power in this case. *See, e.g.*, *Madison*, 474 F.3d at 131. This is a *statutory* holding, based on established canons of statutory construction, and petitioner demonstrably errs in his attempt to inject a constitutional issue where it does not belong.

As to the second question—whether Congress intended to regulate third-party individuals whose conduct was otherwise beyond the federal government's regulatory power—the court of appeals carefully reviewed the statutory text, and determined that petitioner's theory would attribute to Congress a desire to push its regulatory power to the outermost constitutional limit—without any indication (much less

the required *clear* indication) that this was Congress's actual intent. By slapping a constitutional label on this statutory holding, petitioner would generate, not avoid, constitutional issues, and invite, not eliminate, a constitutional crisis over difficult issues that otherwise could be sensibly avoided by adopting a more modest approach. *Cf. Northwest Austin Mun. Utility Dist. No. One v. Holder*, 129 S. Ct. 2504, 2513 (2009). If Congress truly wishes to push the envelope on this argument, it has the power to amend the statute to make its intention clear. But until it does so, the Fifth Circuit was plainly correct in avoiding the constitutional question when the statutory text did not compel petitioner's interpretation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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